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State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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RECORDS AND REPORTING

DATE: AUGUST 17, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (FORDHAM) *JK*
DIVISION OF COMPETITIVE SERVICES (KENNEDY/R. MOSES) *MO*

RE: DOCKET NO. 991459-TI - INVESTIGATION OF POSSIBLE VIOLATION OF COMMISSION RULES OR OF CHAPTER 364, FLORIDA STATUTES, BY EXCEL TELECOMMUNICATIONS, INC., AND IMPOSITION OF APPROPRIATE PENALTY.

AGENDA: 8/29/00 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\991459.RCM

CASE BACKGROUND

- March 21, 1990 - Excel Telecommunications, Inc. (Excel), was granted Certificate Number 2440 to provide interexchange telecommunication services in the State of Florida.
- March 21, 1996 - Order No. PSC-96-0401-AS-TI was issued accepting Excel's settlement offer of \$10,000 for apparent violation of Rule 25-4.118, Florida Administrative Code.
- February 22, 1999 - Order No. PSC-99-0368-AS-TI was issued accepting Excel's settlement offer of \$68,000 for apparent violation of Rule 25-4.118, Florida Administrative Code.

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PSC-RECORDS/REPORTING

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- June 2, 1999 - Staff met with Excel to discuss the increased level of apparent slamming complaints attributed to a select group of Excel Independent Representatives (IRs).
- September 24, 1999 - Staff opened this docket to investigate the marketing practices of Excel.
- January 31, 2000 - Excel reported gross operating revenues of \$66,601,664.00 and intrastate revenues of \$19,403,730.00 on its Regulatory Assessment Fee Return for the period July 1, 1999, through December 31, 1999.
- February 18, 2000 - Staff met with Excel to discuss measures implemented by Excel to remedy the situation whereby unauthorized carrier change requests were being submitted by its IRs.
- August 4, 2000 - Excel submitted its offer of settlement as resolution to the apparent unauthorized carrier changes. (Attachment A, Pages 7-15)
- August 11, 2000 - Request for postponement of Prehearing approved by Commission Chair and filed with Records and Reporting.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission accept the settlement offer proposed by Excel Telecommunications, Inc. to resolve the apparent violations of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection?

RECOMMENDATION: Yes. The Commission should accept the company's settlement proposal. The contribution should be received by the Commission within ten business days after issuance of the Commission's Order and should identify the docket number and company name. The Commission should forward the contribution to the Office of the Comptroller for deposit in the State General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the company fails to pay in accordance with the terms of the settlement offer, the company's certificate should be canceled, and this docket should be closed. **(Kennedy/R. Moses)**

STAFF ANALYSIS: On June 2, 1999, Excel notified staff that it had experienced an increase in the number of slamming complaints filed by consumers. Excel suspected that the increase in slamming complaints was attributable to a concentrated group of Excel IRs. Based on the increase in numbers of calls from consumers, Excel began its own internal investigation of the IRs. At the same time, Excel implemented Third Party Verification (TPV) on all residential carrier change requests. Since that time, staff and Excel met on numerous occasions to discuss the progression of Excel's investigation. Excel notes in a confidential filing that a significant number of customers' service was affected by a small group of Excel IRs. Based on these findings, staff opened this docket on September 24, 1999, to investigate Excel's marketing practices. The Commission's Division of Consumer Affairs has closed 23 consumer complaint cases as slamming and 19 consumer complaints, initially categorized as slamming, are still under investigation.

Staff met with Excel on several occasions to review the remedial measures implemented by Excel to prevent the reoccurrence of this problem and to discuss staff's concerns regarding the number of consumers affected by this problem and the fact that this is the third docket opened against Excel for the same apparent violation of Rule 25-4.118, Florida Administrative Code, Local, Local Toll, or Toll Provider Selection. Excel also expressed concern and stated that this case is different from the other unauthorized carrier change cases because the consumer complaints stem from the actions of a concentrated group of IRs that set out to defraud Excel. Excel provided that these IRs have been terminated for their actions.

On August 14, 2000, Excel submitted its offer of settlement. In its settlement offer, Excel agreed to the following:

- Excel has issued refunds or credits to the accounts of Florida consumers claiming their long distance service was switched to Excel without authorization and Excel will continue to provide remuneration to each Florida consumer in accordance with Florida law and the Company's policy.
- Excel terminated its relationship with each IR that Excel had reason to believe engaged in improper or illegal conduct intended to defraud Excel or mislead Florida consumers and will continue to terminate its relationship with any other IRs that are found to have engaged in improper or illegal activity.

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- Excel acknowledges that the long-distance service of some Florida consumers was switched to Excel without their authorization by IRs acting in concert with others and without actual or apparent authority and contrary to explicit and repeated instructions from Excel.
- Excel has withheld and shall continue to withhold compensation from any IR that Excel has reason to believe engaged in improper or illegal activity.
- Excel will make a voluntary contribution of \$400,000 to the General Revenue Fund of the State of Florida. Excel understands that this settlement does not in any way preempt, preclude, or resolve any matters under review by any other state agencies or departments.
- Excel will continue to employ the third party verification process on all residential carrier change requests. Excel will not discontinue this practice without notifying the Commission no less than 30 days prior to discontinuance.
- Excel will investigate all allegations that a consumer's long distance service was switched to Excel without the customer's knowledge or consent and will take appropriate action against IRs, including terminating its relationship with IRs.
- Excel will provide training pertaining to relevant regulatory requirements, proper marketing practices, and Excel policies, to all active IRs within one year after the date of acceptance of this settlement agreement. Excel will withhold payments to IRs that have not provided a signed statement certifying that training has been completed.
- Excel will provide written information concerning slamming, proper marketing practices, and Excel policies, to all new IRs that reside in Florida. Within three months after becoming an IR, Excel will offer training and require that the IR provide Excel a signed statement certifying that training has been completed, otherwise payments will be withheld.
- Excel will train IRs through live seminars, video and/or interactive media. Excel will provide copies of training materials to Commission staff for review and comments.

Because this is the third time Excel has been investigated for the unauthorized change of customers' long distance carriers, staff seriously considered recommending cancellation of Excel's

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Certificate of Public Convenience and Necessity. Because Excel voluntarily notified staff of the problem and had already taken positive steps to care for the affected customers, plus implemented a 100% TPV on residential accounts, staff supports Excel's settlement offer. However, should Excel fail to maintain appropriate management controls and slamming were to continue, staff will recommend cancellation in any future docket.

Staff believes that because Excel utilizes IRs, its exposure to claims of unauthorized carrier changes is increased. However, staff believes that the implementation of 100% TPV on all residential PIC change requests should minimize, if not eliminate, the unauthorized carrier changes. Staff also believes that the training requirement will reiterate to active and new IRs, the importance of following the proper procedures when soliciting customers' long distance service and submitting the PIC change requests. Staff notes that Excel has credited customers for all charges incurred while on Excel's service.

Therefore, staff believes the terms of the settlement agreement as summarized in this recommendation are fair and reasonable and supports the voluntary contribution to the General Revenue Fund pursuant to Section 364.285(1), Florida Statutes, in the amount of \$400,000. The contribution should be received by the Commission within ten business days after issuance of the Commission's Order and should identify the docket number and company name. The Commission should forward the contribution to the Office of the Comptroller for deposit in the State General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the company fails to pay in accordance with the terms of its settlement offer, the company's certificate should be canceled, and this docket should be closed.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. With the approval of Issue 1, the prehearing and hearing may be canceled, but this docket should remain open pending the remittance of the \$400,000 voluntary contribution within ten business days after issuance of the Commission's Order. Upon remittance of the \$400,000 settlement, this docket should be closed. The \$400,000 settlement should be forwarded to the Office of the Comptroller for deposit in the State General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the company fails to pay in accordance with the terms of the settlement offer, the company's certificate should be canceled, and this docket should be closed. If Issue 1 is not approved, new dates will be established for Hearing. **(Fordham)**

STAFF ANALYSIS: With the approval of Issue 1, the prehearing and hearing may be canceled, but this docket should remain open pending the remittance of the \$400,000 voluntary contribution within ten business days after issuance of the Commission's Order. Upon remittance of the \$400,000 settlement, this docket should be closed. The \$400,000 settlement should be forwarded to the Office of the Comptroller for deposit in the State General Revenue Fund pursuant to Section 364.285(1), Florida Statutes. If the company fails to pay in accordance with the terms of the settlement offer, the company's certificate should be canceled, and this docket should be closed. If Issue 1 is not approved, new dates will be established for Hearing.

SETTLEMENT PROPOSAL

Excel Telecommunications, Inc. ("Excel") hereby makes the following settlement proposal to the Public Service Commission of the State of Florida (the "PSC" or "Commission"):

1. Excel was issued a Certificate of Authority to provide telecommunications services in the State of Florida; therefore, Excel is subject to the applicable laws of the State of Florida and to the rules and regulations of the Commission.
2. In May of 1999, Excel began to receive reports that raised concerns. First, the company noticed that the number of internally generated Service Not Requested ("SNR") reports had increased for South Florida. The SNR designation categorizes -- but does not verify or confirm -- "service not requested" complaints or customer cancellations. Second, Excel was hearing of conduct inconsistent with, or in violation of, the Company's policies and procedures, including, but not limited to, reports that Excel service requests had been submitted for certain customers without their authorization. Although Excel did not know the exact nature of the problem or its extent, Excel, on its own initiative, immediately reported its concerns to the Florida PSC in June, 1999 and has continued to cooperate with the Commission in its investigation of this conduct.
3. On September 24, 1999, the Commission opened this Docket No. 991459 entitled: Investigation of the Marketing Practices of Excel Telecommunications, Inc. for the purpose of conducting an investigation of allegations that certain Florida consumers' long distance service had been switched to Excel without their knowledge or consent.
4. During the course of its investigation, Staff has reviewed complaints of Florida consumers, reviewed documents and information provided by Excel, and has met with

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representatives of Excel. As a result of its inquiries, Staff believes that Excel's recitation of the facts underlying this settlement proposal are true and correct.

FACTS UNDERLYING THIS SETTLEMENT PROPOSAL

5. Before the Commission opened this docket, Excel detected through its internal processes and procedures, an increase in "service not requested" inquiries. Following detection of this increase, Excel took decisive action, including:

A. Excel contacted the Commission in May 1999, and met with Staff at the Commission's offices on June 2, 1999 to apprise Staff of the possible problem.

B. Beginning on June 1, 1999, Excel voluntarily converted to a process utilizing independent third party verification ("TPV") of all residential PIC change requests, including those initially received by signed letter of authorization ("LOA"), with the exception of PIC change requests made directly by the consumer to a LEC.

C. Excel contacted federal law enforcement authorities to advise them of its discovery of a criminal scheme to defraud the Company and has continued to cooperate with the authorities in their ongoing investigation of the conduct.

D. Excel has taken affirmative steps to terminate the positions of all independent contractors who it has reason to believe have engaged in improper conduct and has otherwise acted to ensure that independent contractors do not benefit from unauthorized switching of consumers to Excel.

E. Excel voluntarily and at its own expense sent to active Florida customers enrolled by independent contractors with whom Excel terminated its relationship a written notice which explains that Excel is their long-distance carrier, describes their rights under Florida law and further informs the customer that any complaints about their telephone service may be

reported to the Commission.

F. Excel authorized appropriate credits or refunds to all Florida consumers who alleged that they were switched to Excel without proper authorization.

G. Excel implemented a manual review of all new independent contractor applications.

H. Excel substantially enhanced its training with respect to telecommunications regulatory requirements, including but not limited to, those relating to "slamming."

I. In addition, before the opening of this docket, Excel had entered into discussions with Staff concerning complaints to the Commission by Florida customers who alleged that their long-distance service was switched to Excel without their knowledge or consent. Excel will continue to work with Staff to investigate and resolve each complaint.

6. Unauthorized switching of a consumer's long distance service violates federal and state law. This practice also violates the contracts entered into by each of Excel's independent sales representatives, as well as Excel's very clear and long-standing policies and procedures. The contracts between Excel and its independent contractors make clear that Excel will terminate its relationship with independent contractors who switch customers improperly, and may refer such contractors to the appropriate federal or state authorities for criminal prosecution.

7. An independent investigation conducted on behalf of Excel has confirmed that certain independent sales representatives and other persons and entities unaffiliated with Excel engaged in a scheme to defraud Excel. The conduct of those independent sales representatives violated their contracts with Excel, as well as Excel's very clear and long-standing policies and procedures which had been communicated to those representatives. The primary focus of the

criminal scheme related to Excel's former practices which included advance payments to Independent Representatives prior to a third party verifying that the customer wanted to subscribe to Excel's service. Excel has discontinued this advance payment practice. The criminal conduct was aimed at deceiving Excel into paying these advance payments by creating fictional Independent Representatives and unauthorized customers. Certain Independent Representatives acted in concert with and paid telemarketers, not associated in any way with Excel, to fraudulently obtain identification information, such as social security numbers, addresses, phone numbers, etc. These Independent Representatives then improperly used the identification information they had "bought" to create fictional and/or unauthorized Independent Representatives and customers. Although not the primary focus of the criminal scheme, one partial consequence of the criminal scheme was that, acting without authority, the independent sales representatives engaged in various illegal acts, including but not limited to, the switching of customers to Excel without proper authorization.

8. Once Excel's investigation detected the existence of a criminal scheme to defraud the company, Excel contacted federal law enforcement authorities. Excel has continued to cooperate with federal authorities in their ongoing investigation of that conduct.

9. Excel has worked and continues to work to ensure that no independent contractors derive financial benefit from this fraudulent and illegal activity. These measures include the termination of all independent contractors Excel believes have engaged in improper conduct and the withholding or charging back of compensation payments triggered by such conduct.

10. Consistent with its policies and procedures, Excel has voluntarily authorized credits for the accounts of consumers who have claimed that their long-distance service was switched to Excel without their knowledge or consent. In addition, Excel has facilitated

transferring the long-distance service accounts of these consumers back to the consumer's carrier of choice, at Excel's expense. Moreover, Excel has further strengthened its various policies designed to prevent and detect "slamming" and other improper conduct. For example, beginning on June 1, 1999, Excel voluntarily converted to a process utilizing independent TPV of all residential PIC change requests, including those initially received by signed LOA, with the exception of PIC change requests made directly by the consumer to a LEC. This step, coupled with other measures taken by Excel, appears to have effectively halted the criminal conduct discovered by Excel. According to Commission records, and to Excel's best knowledge, no complaints involving alleged forgeries of Excel Florida customer orders with service commencement dates after July 1, 1999 have been lodged with the Commission or received by Excel.

11. The criminal scheme to defraud Excel has cost the Company substantial sums of money. Clearly this scheme was aimed at Excel and not directed by Excel toward its customers. Moreover, the scheme was specifically crafted to circumvent Excel's existing safeguards against "slamming" for the purpose of, among other things, violating Excel's policies and procedures. Finally, Excel's goodwill and reputation have been threatened by this fraudulent and illegal activity.

THE PROPOSED TERMS OF SETTLEMENT

12. Excel does not, by virtue of this Settlement Proposal or in connection with any other action taken or not taken in this investigation, admit any wrongdoing. Nevertheless, in taking the actions described above Excel satisfied and exceeded the measures contemplated as mitigating factors in Commission Rule 25-4.118(13)(b).

13. Given the foregoing, in order to resolve this matter, Excel offers the following for consideration by the Commission:

A. Excel has voluntarily authorized appropriate refunds or credits to the accounts of Florida consumers who contacted Excel claiming that their long-distance service was switched to Excel without their consent. Excel will continue to provide such remuneration to Florida consumers in accordance with Florida law and the Company's policies.

B. Excel has voluntarily terminated its relationship with all independent contractors that Excel had reason to believe engaged in improper or illegal conduct intended to defraud Excel or to mislead Florida consumers. Excel will continue to determine whether other independent contractors may have switched the long-distance service of Florida consumers without their authorization or otherwise violated Excel's policies. If Excel reasonably believes that other independent contractors have engaged in such conduct, Excel will terminate its relationship with those contractors.

C. Excel acknowledges that the long-distance service of some Florida consumers was switched to Excel without their authorization, albeit by *ultra vires* acts of independent contractors acting in concert with others and without actual or apparent authority and contrary to explicit and repeated instructions from Excel. Such unauthorized switching violates the express terms of the contract these independent contractors executed with Excel, which states that such unauthorized switching "will result in the immediate termination of the Independent Representative and forfeiture of all commissions and other payments," and violates Excel's clear and long standing policies and procedures communicated to each independent contractor.

D. Excel represents that it has suffered substantial losses from the conduct of

these independent contractors. To ensure that independent contractors do not profit from this illegal conduct, Excel has withheld and shall continue to withhold the payment to any contractor of compensation that Excel has reason to believe was generated by the conduct described above.

E. Excel agrees to pay a voluntary contribution to the State treasury in settlement, to the extent of the Commission's authority and subject to the limitations contained in section 13 K., below, of all claims of apparent violations of Florida law and the rules and regulations of the Commission that have been or could have been asserted as of the date of the agenda conference wherein this proposal is approved by the Commission. The voluntary payment shall be in the amount of \$400,000.00, payable within five business days of receipt by Excel of the Commission's Order approving this proposal.

F. Excel has voluntarily converted to a process utilizing independent TPV of all residential PIC change requests, including those initially received by signed LOA, with the exception of PIC change requests made directly by the consumer to a LEC. Excel shall continue to employ TPV. Should Excel ever elect to discontinue the use of TPV for Florida customers, the Company shall, no later than 30 days prior to such discontinuation, notify the PSC of its intention to discontinue TPV for Florida customers.

G. Excel shall investigate all allegations that a consumer's long-distance service was switched to Excel without the consumer's knowledge or consent. Excel shall take appropriate action against any independent contractors, including terminating its relationship with independent contractors, responsible for such switching.

H. Excel shall, within one year of the date of entry of the Order approving this proposal by the Commission, offer training concerning relevant regulatory requirements,

proper marketing practices, and Excel policies to all active¹ Independent Representatives that reside in Florida. All active Florida Independent Representatives shall, upon completing their training, be required to sign a statement certifying that they have undergone the requisite training program. Excel shall withhold payments otherwise due to any active Independent Representative who does not, within one year of the date of entry of the Order approving this proposal by the Commission, provide the Company with a signed statement certifying that he/she has undergone the requisite training program.

I. Excel shall, upon their becoming an Independent Representative, provide written information concerning "slamming," proper marketing practices, and Excel policies to all new² Independent Representatives that reside in Florida. Furthermore, Excel shall, within three months of their becoming an Independent Representative, offer training concerning relevant regulatory requirements, proper marketing practices, and Excel policies to all new Independent Representatives that reside in Florida. All new Florida Independent Representatives shall, upon completing their training, be required to sign a statement certifying that they have undergone the requisite training program. Excel shall withhold payments otherwise due to any new Independent Representative who does not, within three months of their becoming an Independent Representative, provide the Company with a signed statement certifying that he/she has undergone the requisite training program.

J. The training contemplated under this proposal will be provided through

¹ For purposes of this provision, an "active" Independent Representative is defined as any Independent Representative who resides in Florida and to whom Excel has issued a payment in the three months preceding the entry of the Commission's Order approving this proposal.

² For purposes of this provision, a "new" Independent Representative is defined as any Independent Representative who resides in Florida and who has become an Independent

live seminars, video, and/or interactive media. Staff will be provided copies of the training materials contemplated under this proposal for their review and comments.

K. Excel understands that this settlement does not in any way preempt, preclude, or resolve any matters under review by any other state agencies or departments.

L. Upon issuance by the Commission of an Order accepting this settlement proposal, Docket No. 991459 shall be closed.

Excel Telecommunications, Inc.

By: Christopher P. Kelly
Christopher P. Kelly

Title: Vice President and General Counsel

Date: August 2, 2000

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Representative of Excel following entry of the Commission's Order approving this proposal.